

88-144

Supreme Court, U.S.

FILED

JUL 22 1988

JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

RICHARD R. SYRE,
Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Third Circuit

PETITION FOR WRIT OF CERTIORARI

RICHARD R. SYRE, *pro se*
Box 3
Woodruff, Wisconsin 54568
(715) 588-3064



QUESTION PRESENTED FOR REVIEW

Does the Double Jeopardy Clause bar government appeal seeking to reinstate a jury conviction when, after construing the evidence in a light most favorable to the state, the appellate court has found the state's evidence to be insufficient to sustain the conviction?

PARTIES TO THE PROCEEDINGS

COMMONWEALTH OF PENNSYLVANIA

Frank Tuplin
Deputy Attorney General
Commonwealth of Pennsylvania
206 State Office Bldg.
Philadelphia, PA 19130

SUPREME COURT OF PENNSYLVANIA
PHILADELPHIA COURT OF COMMON PLEAS
CITY OF PHILADELPHIA
PHILADELPHIA DISTRICT ATTORNEY
RENDELL, EDWARD
KUBACKI, JUDGE STANLEY
WOLF, HELEN
HENSON, ERIC
PARRY, LLOYD GEORGE

Sarah Vanderbraak
Office of the District Attorney
1300 Chestnut Street
Philadelphia, PA 19107

SPRAGUE, RICHARD
MILLER, ANNE
RUBENSTONE, EDWARD
SPRAGUE, GOLDBERG
& RUBENSTONE

MORRIS SLOTSKY
PENN RADIO CAB, INC.

Philip Weinberg
Attorney at Law
Sprague, Thall &
Albert
135 S. 19th Street
Philadelphia, PA 19103

Robert Donaghy
Burrell, Waxman,
Donaghy & Lee
17th Floor
230 So. Broad Street
Philadelphia, PA 19102

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Parties to the Proceedings	ii
Table of Contents	iii
Table of Authorities	iv
Appellate Court Ruling Subject to Review	1
Jurisdictional Statement	1
Verbatim Constitutional Provisions	1
Statement of the Case	2
Argument	7
Conclusion	18
Appendix	A-1 - A-6
District Court Order, Aug. 21, 1987	A-1, A-2
Circuit Court Judgment Order, Mar. 30, 1988 ...	A-3, A-4
Denial of Rehearing, April 26, 1988	A-5, A-6

TABLE OF AUTHORITIES

	Page
Cases:	
Abney v. United States, 431 U.S. 651 (1977)	9
Burks v. United States, 437 U.S. 1 (1978)	2,8,14,16,19
Commonwealth v. Coleman, 532 A.2d 477 (Pa. Super. 1987)	10
Commonwealth v. Fitzhugh, 520 A.2d 424 (Pa. Super. 1987)	10
Commonwealth v. Smalis, 465 A.2d 16 (Pa. Super. 1983) (Affirmed en banc, <i>sub nom. Commonwealth v. Zoller</i> , 480 A.2d 1046 (Pa. Super. 1984); reversed, 490 A.2d 394 (Pa. 1985); U.S. cert. granted, 1985; reversed, <i>Smalis v. Pennsylvania</i> , 106 S.Ct. 1745 (1986)	4
Commonwealth v. Syre, 469 A.2d 1059 (Pa. Super. 1983)	2,3,17
Commonwealth v. Syre, 489 A.2d 1340 (Pa. 1985)	4
Commonwealth v. Syre, 501 A.2d 671 (Pa. Super. 1985)	4
Commonwealth v. Syre, 518 A.2d 535 (Pa. 1986)	5
Hudson v. Louisiana, 450 U.S. 40, 44 - 45 (1981)	16
Jackson v. Virginia, 443 U.S. 307 (1979)	11
Kepner v. United States, 195 U.S. 100, 133 (1905)	15
Lowe v. State, 744 P.2d 856 (Kan. 1987)	10
Municipal Court v. Lydon, 466 U.S. 294 (1984)	2
Pulliam v. Allen, 466 U.S. 522 (1984)	13

Sanabria v. United States, 437 U.S. 54 (1978)	8
Smalis v. Pennsylvania, 106 S.Ct. 1745 (1986).....	<i>passim</i>
State v. Gurske, 395 N.W.2d 353 (Minn. 1987)	10
State v. Montecello Developers, Inc., 515 N.E.2d 1070 (Ind. 1987)	10
Syre v. Pennsylvania, 107 S.Ct. 1577 (1987)	5
United States v. Martin Linen Supply Co., 430 U.S. 564 (1977)	7,8,9,15,16
United States v. Ball, 163 U.S. 662 (1896)	15
United States v. Giampa, 758 F.2d 928 (3rd Cir. 1985) ..	16
United States v. Scott, 437 U.S. 82, 91 (1978)	8
United States v. Sisson, 399 U.S. 267, 290 (1970)	15
United States v. Vogel, 790 F.2d 368 (3rd Cir. 1986)	16
United States v. Wilson, 420 U.S. 332, 347 (1975)	15
Wright v. State, 515 A.2d 1157 (Md. 1986)	10
Statutes:	
42 U.S.C. 1983	4,11
F.R.Cr.P. Rule 29	7,9,15
F.R.Cr.P. 29(d) Amended Nov. 10, 1986, Pub.L 99- 646, § 54(a), 100 Stat. 3607	10
Pa.R.Cr.P. 1124	7,9
Pennsylvania Rules of Disciplinary Enforcement, Rule 214	3



No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

RICHARD R. SYRE,
Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Third Circuit

PETITION FOR WRIT OF CERTIORARI

APPELLATE COURT RULING SUBJECT TO REVIEW

Appeal is taken from Judgment Order March 30, 1988, No. 87-1570, affirming District Court dismissal order of August 21, 1987. (D.C. Civil No. 85-7146) Rehearing Denied April 26, 1988. (Appendix 1 — 6).

JURISDICTIONAL STATEMENT

Jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. 1254(1).

VERBATIM CONSTITUTIONAL PROVISIONS

Fifth Amendment to the United States Constitution:

“ . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ”

STATEMENT OF THE CASE

On September 2, 1983, the Pennsylvania Superior Court overturned Petitioner Richard Syre's jury conviction on witness tampering charges brought by the Philadelphia District Attorney. *Commonwealth v. Syre*, 469 A.2d 1059 (Pa. Super. 1983). The Superior Court, after having construed all the evidence in a light most favorable to the prosecutor, found the prosecutor's evidence presented against Syre to be insufficient to prove the charges.

The Petitioner's claim in this Petition for Certiorari is that the Double Jeopardy Clause barred the government's appeal of this Superior Court decision on the merits acquitting Syre. *Smalis v. Pennsylvania*, 106 S.Ct. 1745 (1986); *Burks v. United States*, 437 U.S. 1 (1978). Therefore, the Federal Court of Appeals for the Third Circuit by refusing to enjoin further prosecution erred when it ruled that an "intermediate" appellate court's evidentiary insufficiency ruling can be reversed to reinstate a conviction because it is the necessity for a retrial, not the appeal itself, that offends the Double Jeopardy Clause. (Citing *Municipal Court v. Lydon*, 466 U.S. 294 (1984) (A 2-4).

A rule of finality that is vague is a contradiction in terms. The United States Supreme Court should grant certiorari and reverse because the Third Circuit's decision, though unreported, nevertheless makes appellate courts' absolute power to consider challenges to the sufficiency of evidence uncertain.

On December 4, 1981, a Philadelphia Common Pleas jury convicted Syre on one count of witness tampering. The jury found that Syre, an attorney, attempted to induce a victim of an alleged assault to withdraw criminal charges against Syre's clients by means of payments "dressed-up", in the prosecutor's words, as a civil settlement for the victim's injuries arising out of the alleged assault.

The evidence presented at trial was the direct, documentary evidence of government transcripts of Syre's conversations

secretly recorded for the prosecutor by the alleged assault victim and the written civil settlement agreements reciting the terms and conditions of the settlement.

Ignoring that release-dismissal agreements are routine in settling criminal assault charges Common Pleas Judge Kubacki denied Syre's demurrer and numerous motions for mistrial based upon alleged instances of prosecutorial misconduct. Judge Kubacki sentenced Syre to provide community legal services for one year. Since the Pennsylvania Supreme Court would not stay Syre's automatic suspension under the Pennsylvania Rules of Disciplinary Enforcement, Rule 214 (1981) Syre lost his license to practice law while he appealed his conviction.

When the Superior Court reversed Syre's conviction on grounds of the insufficiency of the evidence that court found it unnecessary to consider other issues Syre raised on appeal. *Commonwealth v. Syre*, 469 A.2d 1062 n.6 (Pa. Super. 1983). By specific court order grounded on double jeopardy principles the Superior Court terminated the prosecution including Syre's right to win a retrial.

Because Judge Kubacki sentenced Syre to practice law and the Pennsylvania Supreme Court, contradicting the terms of the sentence, would not stay automatic suspension pending Syre's appeal the prosecutor was given an opportunity by way of further government appeals to pressure Syre, on threat of further suspensions, to accept the token sentence and thereby relinquish his successful challenge to the merits of the prosecutor's case. The contention here is that government appeal of Syre's court ordered acquittal offends the Double Jeopardy Clause as well as common sense.

On February 21, 1984, the Pennsylvania Supreme Court granted the Philadelphia District Attorney's Petition for Allowance of Appeal of the Superior Court's evidentiary insufficiency decision even though such an appeal apparently violated double jeopardy principles announced in *Com-*

monwealth v. Smalis, 465 A.2d 16 (Pa. Super. 1983) (Affirmed en banc, *sub nom. Commonwealth v. Zoller*, 480 A. 2d 1046 (Pa. Super. 1984)) On March 29, 1985, the Pennsylvania Supreme Court reversed *Commonwealth v. Smalis* and *Commonwealth v. Zoller*, 490 A.2d 394 (Pa. 1985) (U.S. Cert. granted Nov. 4, 1985).

Thus, the Pennsylvania Supreme Court gave to itself questionable jurisdiction to overturn Syre's acquittal. *Commonwealth v. Syre*, 489 A.2d 1340 (Pa. 1985) The Pennsylvania Supreme Court reinstated Syre's conviction on the grounds that in his discussions with the witness Syre referred to an agreement that was only an "ostensible" settlement of civil liabilities (489 A. 2d at 1342) and that a subsequent written settlement agreement was a "subterfuge designed to conceal the witness tampering that occurred on September 22, 1980," when the discussion of the "ostensible" civil settlement agreement took place. (489 A. 2d at 1346)

On remand, on November 29, 1985, the Superior Court again reversed Syre's conviction, awarding Syre the right to retrial, because Judge Kubacki's court clerk interfered with jurors:

"The evidence which overwhelmingly demonstrates that a representative of the court discussed the accused's guilt with those who would ultimately decide his fate, went beyond a likelihood of prejudice to an outright showing of actual prejudice." *Commonwealth v. Syre*, 501 A.2d 671 at 673 - 674 (Pa. Super. 1985)

On December 12, 1985, Syre filed this civil rights action under 42 U.S.C. 1983 in the United States District Court for the Eastern District of Pennsylvania seeking a federal injunction and declaratory relief protecting him against further prosecution by the State of Pennsylvania.

Syre claimed that the evidence was totally insufficient because the prosecutor, who was the proponent of the direct evidence,

controverted his own evidence destroying any true controversy and rendering the criminal charges nonjusticiable. The government's theory that Syre was concealing a bribe behind a legitimate settlement agreement is self contradictory because the alleged crime is then concealed from the victim who is recording his transactions to secure evidence for the prosecutor. By controverting his own direct evidence the prosecutor created doubt but it is self contradictory to suggest he has proven anything beyond a reasonable doubt and, therefore, justiciability is an impossibility.

From December 12, 1985, to May 29, 1987, the Federal District Court in Philadelphia took no action on Syre's Complaint. In this period of time the United States Supreme Court, in May, 1986, announced its decision in *Smalis v. Pennsylvania* concerning the finality of evidentiary insufficiency decisions. On November 10, 1986, the Pennsylvania Supreme Court, while a named defendant in the federal suit to enjoin further judicial harassment, granted the District Attorney's second Petition for Allowance of Appeal and, then, immediately reinstated the conviction without remand for consideration of other legal errors raised in Syre's appeal. *Commonwealth v. Syre*, 518 A.2d 535 (Pa. 1986)

Syre appealed to the United States Supreme Court on grounds of due process and denial of an impartial jury. On March 23, 1987, Syre's Petition for Certiorari was denied. *Syre v. Pennsylvania*, 107 S.Ct. 1577 (1987).

On May 18, 1987, Syre asked the Federal District Court to enjoin his further prosecution on double jeopardy grounds citing *Smalis v. Pennsylvania*. On May 29, 1987, the District Court Judge dismissed Syre's Complaint, without reply from the defendants, on grounds of the passage of the statute of limitations and absolute immunity. Judge Kubacki, a named defendant, would not even rule on the issue of acquittal but instead modified Syre's sentence to two hundred hours community ser-

vice in Wisconsin and then had Syre arrested when Syre refused to relinquish his double jeopardy claims.

On August 21, 1987, upon Syre's Motion for Reconsideration the District Court dismissed Syre's claim to protection of his civil rights under the Double Jeopardy Clause with this misstatement of the law: "Where . . . an intermediate appellate court has overturned a conviction on the basis of the insufficiency of evidence, further appellate review does not violate double jeopardy." (A 1 - 2)

On December 21, 1987, the Vilas County Circuit Court in Wisconsin upon the State's request, based upon Syre's double jeopardy claim, quashed the Extradition Warrant issued against Syre.

Meanwhile, without opinion a panel of judges of the United States Court of Appeals for the Third Circuit in a Judgment Order dated March 30, 1988, affirmed the District Court. (A 3 -4) Syre's Petition for Rehearing was dismissed on April 26, 1988. (A 5 - 6) On May 21, 1988, the Vilas County Court revoked Syre's habeas corpus protection after the State, reversing its earlier decision, argued that since Syre's conviction could be reinstated he had no double jeopardy protection.

Appeals of the double jeopardy issue in the context of extradition are now pending in Wisconsin. Meanwhile, attorney discipline proceedings predicated on the finality of the reinstated conviction are pending in Pennsylvania against Syre.

ARGUMENT

When the court considers the issue of sufficiency of the evidence, the evidence presented by the prosecutor is not controverted by the defendant. The court accepts the prosecutor's testimonial evidence as true and all reasonable inferences to be drawn from the evidence are drawn in favor of the prosecutor. After such an analysis the court determines, when it grants the defendant's demurrer, that no reasonable juror could conclude from the evidence that the prosecutor has proven the crime charged beyond a reasonable doubt.

The court applies the legal test for evidentiary sufficiency on a motion for acquittal by the defendant. Under Pennsylvania procedure motions for acquittal are governed by Rule 1124, Pa. R. Cr. Pr., which is similar to F.R.Cr.P. Rule 29. Both these rules permit the judge to consider a challenge to the sufficiency of the evidence at any time after the state has rested its case. Thus, a judge may enter an acquittal on the basis of the prosecutor's failure to prove its case before the jury returns a verdict or after the jury returns a verdict of conviction.

When a court ordered acquittal is entered before the jury returns a verdict of guilty a second trial is necessary for two reasons: 1) The first trial was never completed, and 2) The prosecutor's failure of proof can only be cured by a second trial. When a court ordered acquittal is entered after the jury convicts a second trial is unnecessary, if reversal of that acquittal is permissible, because the first trial was completed.

However, the United States Supreme Court held in *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 576 (1977) that government appeal of an acquittal is barred when retrial is necessary — a necessity that arises only because the evidence was found to be insufficient, not because of the timing of the judgment of acquittal. When reversal of a conviction is for grounds other than insufficiency of the evidence retrial, and therefore government appeal, is usually permissible.

Furthermore, the Double Jeopardy Clause, bars retrying a defendant acquitted due to failure of proof even if the decision was an incorrect one. Obviously, if a court's evidentiary insufficiency decision is on the merits and final whether or not it is correct a government appeal of that decision does not serve any purpose.

The critical question as to whether an evidentiary insufficiency decision under Pa. Rule 1124 is a ruling on the merits acquitting the defendant or a court ruling on the law subjecting the defendant to retrial after reversal on government appeal was considered in *Smalis v. Pennsylvania*, 106 S.Ct. 1745 (1986). The United States Supreme Court unanimously rejected the contention of the Pennsylvania Supreme Court that an evidentiary insufficiency ruling, the defendant's successful demurrer under Pa. Rule 1124, was a ruling on the law by the lower court judge which the government could challenge on appeal to a higher court:

“What the demurring defendant seeks is a ruling that as a matter of law the state's evidence is insufficient to establish his factual guilt. Our past decisions, which we are not inclined to reconsider at this time, hold that such a ruling is an acquittal under the Double Jeopardy Clause.” *Id.* at 1748 (Citing *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977); *Sanabria v. United States*, 437 U.S. 54 (1978); and, *Burks v. United States*, 437 U.S. 1 (1978)) *Smalis*, 106 S.Ct., at 1748.

The Supreme Court noted that these holdings are not overturned by *United States v. Scott*, 437 U.S. 82, 91 (1978) wherein the Court said:

“A judgment of acquittal whether based upon a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed and terminates the prosecution when a second trial would be necessitated by reversal.”

It is unlikely that the United States Supreme Court intended to diminish the full power of the appellate court to consider challenges to the sufficiency of evidence by this vague dicta referring to the necessity of a second trial upon reversal. In *Scott* the jury conviction was reinstated because the trial court made an error of law concerning pre-indictment delay in discharging the defendant: The trial court did not apply the evidentiary sufficiency test in discharging the defendant.

Smalis restated the law that it is the character of an evidentiary insufficiency decision as a decision on the merits that determines its finality. On the other hand, reinstatement of a conviction, as well as retrial if necessary, is permissible when the defendant succeeds in reversing a conviction on legal grounds — grounds unrelated to the question of guilt or innocence.

Nevertheless, the *Smalis* Court retained confusing language as regards government appeals:

“... [T]he Double Jeopardy Clause bars a postacquittal appeal by the prosecution not only when it might result in a second trial, but also if reversal would translate into ‘further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged’ *Martin Linen, supra*, at 570” *Id.*, at 1749

In reversing Syre’s jury conviction the Superior Court ruled that Syre’s demurrer should have been granted without submission of the case to the jury. There is no dispute that under Pa.R.Cr.P. 1124, as under F.R.Cr.P. 29, an appellate court has the power to consider a defendant’s challenge to the sufficiency of the evidence. Therefore, as long as any ambiguity exists as to the possibility that a jury conviction can be reinstated upon reversal of a defendant’s successful post conviction appellate court challenge to the sufficiency of the evidence, defendants in every jurisdiction will be compelled to seek immediate review of the denial of their pre-verdict demurrers in order to fully preserve their double jeopardy rights. *Abney v. United States*, 431 U.S. 651 (1977)

Alternatively, defendants will hesitate to challenge evidentiary sufficiency on appeal of a jury conviction until after they have established a right to retrial. The necessity of multiplying proceedings to protect the double jeopardy right itself violates the policy of the Double Jeopardy Clause. That is to say, the dicta in *Smalis* referring to the possibility of reversal of an evidentiary insufficiency decision contradicts the holding but is nevertheless the rule of the case because the dicta makes the absolute power of the appellate court to rule on the sufficiency of the evidence uncertain.

Already Pennsylvania courts relying on the vague dicta concerning the reversal of evidentiary insufficiency decisions in *Smalis* have ruled that post verdict evidentiary insufficiency decisions are subject to review and reversal. *Commonwealth v. Fitzhugh*, 520 A.2d 424 (Pa. Super. 1987), *Commonwealth v. Coleman*, 532 A.2d 477 (Pa. Super. 1987) Recent amendment to Rule 29 speaks of the reversal on judgments of acquittal after verdict of guilty. F.R.Cr.P. 29 (d) Amended Nov. 10, 1986, Pub.L 99-646, Sec. 54(a), 100 Stat. 3607. Other state courts are giving *Smalis* contrary interpretations. E.g. *State v. Gurske*, 395 N.W.2d 353 (Minn. 1987); *State v. Montecello Developers, Inc.*, 515 N.E.2d 1070 (Ind. 1987); *Wright v. State*, 515 A.2d 1157 (Md. 1986); *Lowe v. State*, 744 P.2d 856 (Kan. 1987).

In refusing to grant certiorari the Supreme Court will be creating by default a confusing rule of great consequence going to the question of appellate court jurisdiction. Therefore, the United States Supreme Court should correct immediately the notion that evidentiary insufficiency decisions by "intermediate" appellate courts are less final than lower court pre-verdict evidentiary insufficiency decisions.

It is a contradiction to hold that a pre-verdict evidentiary insufficiency decision is a decision on the merits and final, correct or not, and then assert that the same decision may, nevertheless, be appealed in order to correct it when a conviction may be

reinstated. It is not known at the time of a government appeal if the conviction will be reinstated. The lower court's ruling discharging the defendant on the merits may be found to be correct making for a pointless appeal which harms both the defendant and the judicial process.

The reversal on government appeal of a clearly correct ruling that evidence is insufficient to convict is clearly oppressive. Indeed, the very definition of an oppressive prosecution is one without evidence. Sufficiency of evidence can be challenged by the defendant repeatedly by way of *habeas corpus* petition (*Jackson v. Virginia*, 443 U.S. 307 (1979)) or otherwise as the Petitioner has done in this Section 1983 action for false prosecution. Therefore, continued consideration of cases where the evidence is, indeed, insufficient undermines the integrity of the judicial process.

The Double Jeopardy Clause protects the process by terminating proceedings when facts are decided in the defendant's favor without regard to the correctness of the decision. It is beyond question that appellate courts have the power under the constitution to enter decisions on the merits acquitting defendants. The prosecutor's power not to charge, the jury's power to acquit, the executive's power to pardon as well as the judge's power to terminate prosecutions on weak evidence are all part of a balance of constitutional powers intended by the Founding Father's to assure an enduring and sound government.

An evidentiary insufficiency decision can only be reversed by a decision finding the same evidence sufficient. Therefore, once a lower court finds the evidence insufficient there cannot be a subsequent finding of proof beyond a reasonable doubt without questioning the integrity of the lower court's factual conclusions reached after the lower court construed the evidence in a light most favorable to the prosecution. Thus, there is peril to the judicial process in the reversal of evidentiary insufficiency decisions.

Evidentiary insufficiency decisions are inherently ambiguous because the decision denies generally that the prosecutor's proof is adequate. On the other hand, sufficiency decisions are specific as to both fact and law and, as such, add clarity to the law. The reversal of an evidentiary insufficiency decision usually will not add clarity to the law and, thus, reversal does not serve society's interests.

When the defendant, as here, has also raised legal errors on appeal of his conviction then successful government appeal of the defendant's court ordered acquittal reversing the conviction might, in the words of *Smalis*, lead to a second trial. When sufficiency of the evidence is questionable no trial error can honestly be held to be harmless. Any subsequently corrected legal errors entitling the defendant to a retrial would also entitle him to an acquittal jurisdictionally barring a government appeal that has already occurred.

Therefore, a government appeal of a decision on the merits acquitting the defendant has no proper place in double jeopardy jurisprudence as the procedural history of this case makes clear. When the Pennsylvania Supreme Court reversed Syre's acquittal and remanded to the Superior Court for consideration of trial error's Syre had raised on appeal the Pennsylvania Supreme Court and the Superior Court were placed in a dramatic jurisdictional conflict. On remand to the Superior Court Syre won a retrial on grounds of official interference by the judge's clerk with the jury. (501 A.2d 671)

Thus, shortly after the United States Supreme Court agreed to consider *Smalis v. Pennsylvania*, the Superior Court placed the Pennsylvania Supreme Court in the embarrassing position of ruling on its own jurisdiction to continue an arguably oppressive prosecution. After the United States Supreme Court announced in *Smalis v. Pennsylvania* that the Double Jeopardy clause barred government appeals of evidentiary insufficiency decisions the Pennsylvania Supreme Court reversed the

Superior Court's jury ruling favorable to Syre, reinstated Syre's conviction a second time, and arbitrarily terminated Syre's rights to review of other trial errors he had raised on appeal.

Neither did the fact that the Pennsylvania Supreme Court was a named defendant in Syre's federal action to enjoin further judicial harassment deter the Pennsylvania Supreme Court from exercising questionable jurisdiction over Syre. In the then pending federal action the Pennsylvania Supreme Court claimed judicial immunity for its actions, thus, jurisdiction over Syre could not be relinquished for reasons that had become purely personal to the judges who, it is reasonable to assume, desired to retain judicial immunity.

The District Court dismissed Syre's Complaint on the alternative ground of absolute judicial immunity ignoring that there is no judicial immunity in an action to enjoin judicial conduct. *Pulliam v. Allen*, 466 U.S. 522 (1984) The statute of limitations, the other alternative ground for dismissal, also cannot bar an injunction because the offending conduct — continuing prosecution — is still happening. (A-1)

Hence, it is the claimed unconstitutional exercise of jurisdiction by the Pennsylvania Supreme Court that is the issue, and since the absence of jurisdiction is at issue it is impossible to ignore the claim: The continuing prosecution of Syre must either be approved or enjoined because double jeopardy, being an absolute limit on judicial power, is a self-enforcing right — every law enforcement officer is sworn to uphold the Constitution which forbids continuing the prosecution once a person is acquitted.

Government officials cannot contest the definition of an acquittal indefinitely while they attempt to exact a token sentence in order to avoid the acquitted defendant's constitutional challenge to their exercise of power. The court's refusal to rule on the double jeopardy issue also violates the Double Jeopardy Clause.

Double jeopardy, like the right to an impartial jury, is a constitutional bulwark against the oppressive use of the judicial process which, when it occurs, undermines judicial authority. These constitutional provisions, though expressed in terms of individual rights, protect the judiciary as the final authority on what the law is. When courts controvert each others factual conclusions their legal conclusions, affecting all citizens, are rendered untrustworthy.

The evidentiary insufficiency decision does not make law nor does it state what the facts are. As an opinion that proof has failed an evidentiary insufficiency decision, though it may be shown to be unreasonable, may never be absolutely contradicted because proof is never certain. When the lower court applies the legal test for sufficiency in reaching its factual conclusions its evidentiary insufficiency decision is on the merits and, because it is on the merits, the decision is absolutely final under the Double Jeopardy Clause. This is the law of double jeopardy as it applies to court ordered acquittals as stated by the United States Supreme Court:

“[A]n appellate reversal [on grounds of evidentiary insufficiency] means that the government’s case was so lacking that it should not have even been *submitted* to the jury. Since we necessarily afford absolute finality to a jury’s *verdict* of acquittal — no matter how erroneous its decision — it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.” (emphasis in original) *Burks v. United States*, 437 U.S. 1, 15-16 (1978)

Burks pointed out that earlier cases failed to make a distinction between reversals due to trial error and those resulting from evidentiary insufficiency. Thus, Chief Justice Burger observed for the unanimous Court that “failure to make this distinction has contributed substantially to the present state of conceptual confusion existing in this area of the law.” *Id.* at 15.

In *Martin Linen Supply Co*, 430 U.S. 564, 571 (1977) the United States Supreme Court said:

"Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that '[a] verdict of acquittal * * * could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution.' *United States v. Ball*, 163 U.S. 662 (1896)

Review of a decision on the facts is a retrial of those facts as the United States Supreme Court has observed in the past. To try the defendant again, "even in an appellate court, is to put him a second time in jeopardy for the same offense." *United States v. Wilson*, 420 U.S. 332, 347 (1975) quoting *Kepner v. United States*, 195 U.S. 100, 133 (1905), see also *United States v. Sisson*, 399 U.S. 267, 290 (1970)

Furthermore, the United States Supreme Court has rejected as artificial distinctions based upon the timing of a defendant's motion for acquittal:

"Insofar as the Government desires an appeal to correct error, irrational behavior, or prejudice on the part of the trial judge, its interest is not dependent on the point of trial when the judge enters his Rule 29 judgment and suffers no special prejudice by a judge's acquittal after the jury disagrees and is discharged." *Martin Linen Supply*, at 574.

The United States Supreme Court concluded in *Martin Linen Supply* that the determination by the court that evidence is insufficient acquits the defendant.

"In that circumstance we hold that 'although retrial is sometimes permissible after a mistrial is declared but no verdict or judgment has been entered, the verdict of acquittal foreclosed retrial and thus barred appellate review.' *United States v. Wilson*, 420 U.S., at 348" *Martin Linen Supply*, at 576.

Chief Justice Burger dissented in *Martin Linen Supply* on the ground that the insufficiency ruling presented an issue of law which the Government should be permitted to appeal, however, a year later in *Burks* it is clear that the Court had settled on the distinction between a decision on the merits and a decision on the law as the key factor in the question of finality and that the evidentiary insufficiency ruling was a decision on the merits.

In *Hudson v. Louisiana*, 450 U.S. 40, 44-45 (1981), where the trial court set aside a jury conviction on grounds of evidentiary insufficiency, the United States Supreme Court unanimously agreed that "there are no significant facts which distinguish this case from *Burks*, and the Double Jeopardy Clause barred the State from prosecuting petitioner a second time."

The distinction made by the District Court and affirmed without opinion by the Third Circuit that an intermediate appellate court decision finding the evidence insufficient may be reversed and the conviction reinstated is without support in the law and contrary to the decisions of the United States Supreme Court and also the decisions of the Third Circuit Court of Appeals. *United States v. Giampa*, 758 F.2d 928 (3rd Cir. 1985), *United States v. Vogel*, 790 F.2d 368 (3rd Cir. 1986)

The general rule is that retrial of a defendant who successfully appeals a conviction is permissible. The narrow exception to this rule is that retrial is not permissible when reversal of the conviction is on the grounds of evidentiary insufficiency. To make another exception to the finality of an evidentiary insufficiency decision on the ground that an intermediate appellate court's reversal does not require retrial but merely reinstatement of the original conviction contradicts the fact/law distinction upon which the United States Supreme Court says the question of finality rests.

It is undisputed in this litigation that the Pennsylvania Superior Court used the correct sufficiency standard in analysis of the merits of the prosecutors's case when it found the evidence against Syre to be insufficient:

“Statements, twisted and taken out of context from a tape recording which failed in many instances to capture every word and phrase, may be construed in a variety of ways. The testimony presented by both sides is demonstrative of this analysis. However, we find the evidence does not support the verdict beyond a reasonable doubt, that the appellant attempted in any way to induce Gibbs to testify falsely, to withhold testimony, or to allude [*sic* elude] legal process. Accordingly, we reverse the conviction and order the appellant discharged.” *Commonwealth v. Syre*, 469 A.2d at 1062.

This was a correct decision and its reversal by the Pennsylvania Supreme Court was incorrect. The prosecutor disputed his own evidence by arguing that Syre obeyed the law only because he was aware of surveillance and not because he wished to obey the law. When the prosecutor disputes his own evidence such a case cannot be adjudicated. An attempt to prosecute such a case leads inevitably to trial error as the prosecutor must repeatedly contradict himself.

The Philadelphia District Attorney avoided appellate review of the trial error generated by discrediting his own evidence when the Superior Court acquitted Syre. By multiplying appeals, extradition proceedings, and attorney discipline proceedings against Syre while seeking to exact a token sentence Pennsylvania officials seek to avoid judicial review of their oppressive use of the judicial process by unlawfully continuing to exercise jurisdiction over Syre.

Furthermore, Pennsylvania Courts now allow others to be imprisoned unconstitutionally in order to cloth themselves with jurisdiction in this one case. Finally, it is doubtful that the United States Supreme Court was properly advised, as it should have been by Pennsylvania authorities, when *Smalis v. Pennsylvania* was before the Court, a circumstance that compels clarification of the *Smalis* ruling.

CONCLUSION

The separation of powers doctrine fundamental to a republican form of government underlies the policy of the Double Jeopardy Clause. If the prosecutor could retry acquitted defendants then the legal rulings of the court would be without effect because a new trial would be permitted. As a matter of principle the prosecutor's power to retry a case would nullify the power of the court to administer justice.

While permitting a retrial nullifies the law, permitting appeal of decisions finding the evidence insufficient distorts the law because the finality of an evidentiary sufficiency decision cannot possibly be sustained when a prosecution truly lacks merit without doing violence to the principles of due process which define the judgment process the Constitution entrusts to the judiciary. An evidentiary insufficiency decision does not establish that the prosecution was false but continued efforts to sustain the sufficiency of a false prosecution, when it occurs, will establish the falsity of the oppressive prosecution thereby undermining the independence and integrity of the judiciary.

Once a court determines proof has failed the issue under the Double Jeopardy Clause is what conditions may exist when government proof fails. One condition that may exist, hopefully rare, is that the prosecution is an oppressive one. The Double Jeopardy Clause prevents oppressive prosecutions by making acquittals absolutely final.

Unjust appellate court ordered acquittals are extremely rare and their finality poses no danger to society. Oppressive prosecutions, no matter how rare, do endanger society because law, as well as facts, must be twisted to secure the unjust result.

When the law is distorted in the judicial law making process the commonwealth suffers. The rule of law and trust in the rule of law is effected. As a matter of fundamental jurisprudential principle the appellate court decision finding the prosecutor's

evidence insufficient must be absolutely final as the United States Supreme Court unequivocally said in *Burks v. United States*.

The efforts of Pennsylvania law enforcement officials to sentence Syre to the practice of law then punish him by means of attorney discipline and extradition proceedings for refusing to relinquish his successful challenge to the sufficiency of the prosecutor's evidence is unseemly. The federal court rulings below that have participated in this corruption of the judicial process by acquiescence and delay cannot possibly be sustained as valid judgments.

Since all judges in all jurisdiction must know with certainty when their decisions will actually terminate criminal proceedings the United States Supreme Court should grant certiorari in this case to clarify and enforce the Court's ruling in *Smalis v. Pennsylvania* and *Burks v. United States*. Therefore, the United States Supreme Court should remand this case for entry of an order immediately enjoining Pennsylvania law enforcement officials' continued use of the judicial process against the Petitioner and for further consideration of other claims stated in the Complaint.

Repectfully submitted,

Richard R. Syre, *pro se*

Box 3

Woodruff, WI 54568



APPENDIX



APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD R. SYRE

V.

COMMONWEALTH OF PENNSYLVANIA, et. al.

CIVIL ACTION

NO. 85-7146

ORDER

AND NOW, this 21st day of August, 1987, plaintiff's motion for reconsideration of my order dated May 29, 1987, is hereby denied.

In his motion, plaintiff asserts that my decision was based on the false statement that he was convicted in state court of tampering with a witness. Plaintiff claims this statement is false because the Pennsylvania Supreme Court violated his right against double jeopardy when it reversed the finding of the Superior Court that there was insufficient evidence to convict him.

My decision to dismiss plaintiff's complaint was based almost exclusively on the grounds certain defendants enjoyed absolute immunity and that plaintiff's claims were barred by the applicable statutes of limitations. Only with respect to plaintiff's interference with contract claim did I hold, in the alternative, that defendants had justifiable cause based on plaintiff's conviction. Moreover, plaintiff's conviction has not been overturned or reversed by any court either on direct or collateral review.

Even ignoring these deficiencies, plaintiff does not raise a colorable double jeopardy claim. The double jeopardy clause prohibits "a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to

muster in the first proceeding.” *Burks v. United States*, 437 U.S. 1 (1978). Where, as here, however, an intermediate appellate court has overturned a conviction on the basis of insufficient evidence, further appellate review does not violate double jeopardy. See *White v. Wainwright*, 809 F.2d 1478 (11th Cir. 1987). In this situation, a reversal of the intermediate court by the higher court will result in reinstatement of the conviction, not a second trial. This result has been implicitly recognized by the Supreme Court. See, e.g., *Municipal Court v. Lydon*, 466 U.S. 294, 308-09 (“In *Burks*, supra, we recognized that an unreversed determination by a reviewing court that the evidence was legally insufficient likewise served to terminate the initial jeopardy.”). After the trier of fact reaches a verdict of conviction, initial jeopardy does not conclude until appellate review is completed even if an intermediate court reverses the conviction on the grounds of insufficiency of evidence.

BY THE COURT:

/s/ J. WILLIAM DITTER, JR., J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 87-1570

SYRE, RICHARD R.

v.

COMMONWEALTH OF PENNSYLVANIA
SUPREME COURT OF PENNSYLVANIA
PHILADELPHIA COURT OF COMMON PLEAS
CITY OF PHILADELPHIA
PHILADELPHIA DISTRICT ATTORNEY
RENDELL, EDWARD
SPRAGUE, RICHARD
PARRY, LLOYD GEORGE
KUBACKI, STANLEY
WOLF, HELEN
HENSON, ERIC
MILLER, ANNE
RUBENSTONE, EDWARD
SLOTSKY, MORRIS
PENN RADIO CAB, INC.
SPRAGUE, GOLDBERG & RUBENSTONE

Richard Syre,
Appellant

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civil No. 85-7146)
District Judge: Honorable J. William Ditter, Jr.

Submitted March 18, 1988

BEFORE: STAPLETON, GREENBERG, AND SCIRICA,
Circuit Judges

JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is ORDERED and ADJUDGED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

By the Court,

/s/ Walter K. Stapleton
Circuit Judge

ATTEST:

/s/ Sally Mrvos
Clerk

Dated: March 30, 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 87-1570

SYRE, RICHARD R.

v.

COMMONWEALTH OF PENNSYLVANIA
SUPREME COURT OF PENNSYLVANIA
PHILADELPHIA COURT OF COMMON PLEAS
CITY OF PHILADELPHIA
PHILADELPHIA DISTRICT ATTORNEY
RENDELL, EDWARD
SPRAGUE, RICHARD
PARRY, LLOYD GEORGE
KUBACKI, STANLEY
WOLF, HELEN
HENSON, ERIC
MILLER, ANNE
RUBENSTONE, EDWARD
SLOTSKY, MORRIS
PENN RADIO CAB, INC.
SPRAGUE, GOLDBERG & RUBENSTONE

Richard Syre,
Appellant

SUR PETITION FOR REHEARING

BEFORE: GIBBONS, *Chief Judge*, SEITZ, HIGGIN-
BOTHAM, SLOVITER, BECKER, STAPLETON,
MANSMANN, GREENBERG, SCIRICA, and COWEN,
Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Walter K. Stapleton
Circuit Judge

Dated: April 26, 1988

